No. 82-2056

In the Supreme Court of the United States

OCTOBER TERM, 1983

ESCONDIDO MUTAL WATER COMPANY, ET AL.,
PETITIONERS

v.

LAJOLLA, RINCON, SAN PASQUAL, PAUMA AND
PALA BANDS OF MISSION INDIANS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether Section 8 of the Mission Indians Relief Act, ch. 65, 26 Stat. 714, requires a Federal Power Act licensee whose hydroelectric project traverses Mission Indian reservation lands to obtain the consent of the affected Indian Bands for the use of such lands.

2. Whether Section 4(e) of the Federal Power Act, 16 U.S.C. 797(e), requires the Federal Energy Regulatory Commission to accept without modification conditions developed by the Secretary of the Interior for inclusion in a license for a hydroelectric project that utilizes Indian reservation lands.

3. Whether the Secretary of the Interior's authority under Section 4(e) of the Federal Power Act, to develop conditions for the protection and utilization of reservations, extends to three Mission Indian reservations whose lands are not to be utilized for a hydroelectric project, but whose reserved water rights may be affected by the project.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-30) is reported at 692 F.2d 1223. The court of appeals' order on petitions for rehearing (Pet. App. 31-41) is reported at 701 F.2d 826. The opinions and orders of the Federal Energy Regulatory Commission (Pet. App. 42-309, 310-378) are reported at 6 F.E.R.C. ¶ 61,189 and 9 F.E.R.C. ¶ 61,241. The initial decision of the Administrative Law Judge (not included in the appendix to the petition) is reported at 6 F.E.R.C. ¶ 63,008.

JURISDICTION

The judgment of the court of appeals was entered on November 2, 1982. Petitions for rehearing were denied on March 17, 1983. The petition for a writ of certiorari was filed on June 15, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

Section 8 of the Mission Indians Relief Act ("MIRA"), ch. 65, 26 Stat. 714, is set forth at Pet. App. 379-380. The pertinent provisions of the Federal Power Act ("FPA"), 16 U.S.C. 791a *et seq.*, are set forth at Pet. App. 380-388.

STATEMENT

The legal issues presented arise in the context of the decision of the Federal Energy Regulatory Commission [1] to issue a license permitting the Escondido Mutual Water Company, the City of Escondido and the Vista Irrigation District to operate a small hydroelectric project (Project No. 176) near Escondido, California. As the Commission recognized (Pet. App. 132, 338), however, the principal function of Project No. 176 is not to generate power, but to serve as a water conveyance facility for diverting water from the San Luis Rey River watershed to the Escondido and Vista service areas for municipal and agricultural uses. The instant controversy is only part of a much larger underlying dispute between the petitioners, on the one hand, and the the Secretary of the Interior and the LaJolla, Rincon, San Pasqual, Pauma,

[1] The term "Commission" refers to the Federal Power Commission prior to October 1, 1977, and to the Federal Energy Regulatory Commission thereafter. See 42 U.S.C. (Supp. V) 7172(a) and 7295(b).

and Pala Bands of Mission Indians, on the other, over rights to water in the San Luis Rey River watershed, a dispute over which the Commission acknowledges it has no jurisdiction (*id.* at 99).

1. The San Luis Rey River originates near Palomar Mountain in northern San Diego County, California. In its natural condition, it flows through the LaJolla, Rincon and Pala Indian Reservations and then through the City of Oceanside on its way to the Pacific Ocean. Three other Indian reservations—the Pauma, Yuima [2] and approximately three quarters of the San Pasqual—also are within the watershed. (A general map of the area is reproduced at Pet. App. 30 and 308.) These six Indian reservations were established pursuant to the Mission Indians Relief Act of 1891 ("MIRA"), ch. 65, 26 Stat. 712 *et seq.*

Since 1895, the Escondido Mutual Water Company ("Mutual") and its predecessor in interest have diverted the waters of the San Luis Rey River out of the watershed to the community in and around the City of Escondido. The point of diversion is located within the LaJolla Indian Reservation at a point upstream from the other reservations. The conveyance facility, known as the Escondido Canal, traverses parts of the LaJolla, Rincon and San Pasqual Indian Reservations, as well as some private lands and federal lands administered by the Bureau of Land Management. The canal terminates at Lake Wohlford, an artificial storage facility. Various agreements, dating back to 1894, among the Secretary of the Interior, one of the Mission Indian Bands, and Mutual's predeces-

[2] The two Yuima tracts are under the jurisdiction of the Pauma Band of Mission Indians. Consequently, while six reservations are affected by the project, only five governing Indian Bands are involved in the instant case.

sor purportedly grant rights-of-way for the Escondido Canal across the reservation lands in return for supplying certain amounts of water to the Bands (Pet. App. 49-58). The validity of those agreements is the subject of separate proceedings instituted by the Bands (and subsequently joined by the United States) in the United States District Court for the Southern District of California. *Rincon Band of Mission Indians, et al.* v. *Escondido Mutual Water Co., et al.*, Nos. 69-217-S, 72-276-S & 72-271-S.[3]

In 1915, Mutual constructed the Bear Valley powerhouse, which is located downstream from Lake Wohlford, and which draws water from that lake; the Bear Valley powerhouse has a capacity of 520 kilowatts ("kw") (Pet. App. 53 & n.24). In 1916, Mutual completed construction of the Rincon powerhouse, which is located on the Rincon Reservation and which draws water from the Escondido Canal; the Rincon powerhouse has a capacity of 240 kw (*id.* at 53). In 1922, the predecessor of Vista Irrigation District ("Vista") constructed Henshaw Dam on the San Luis Rey River, approximately nine miles upstream from Mutual's diversion dam. Pursuant to a complex contractual relationship, Vista and Mutual have shared the output of Lake Henshaw and the use of the Escondido Canal (*id.* at 56-58).

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[3] In their complaint, the Bands sought (1) a declaratory judgment that the rights-of-way agreements are void; (2) an injunction prohibiting diversion of the waters of the San Luis Rey River into the Escondido Canal; and (3) substantial damages. On January 10, 1980, the district court entered an order granting partial summary judgment in favor of the Bands and voiding portions of the disputed contracts. The court of appeals refused to permit an interlocutory appeal of that order, and the case remains pending before the district court (Pet. App. 7).

In 1921, following enactment of the Federal Water Power Act of 1920, ch. 285, 41 Stat. 1063 (now codified as Part I of the Federal Power Act ("FPA"), 16 U.S.C. 791a *et seq.*), Mutual applied to the Commission for a license covering its project. In 1924, the Commission issued a 50-year license to Mutual covering the Escondido diversion dam and canal, Lake Wohlford, and the Rincon and Bear Valley powerhouses (but not Vista's Henshaw facilities).[4]

Since 1925, Mutual and Vista have captured approximately 90% of the flow of the San Luis Rey River at the diversion dam on the LaJolla Reservation and have diverted those waters to Lake Wohlford. Approximately 10% of the diverted flow has been delivered to the Rincon Reservation pursuant to a contract entered into by the Secretary of the Interior in 1914. No project water has been delivered to any of the other reservations (Pet. App. 6). As already noted, litigation over the water rights to the San Luis Rey River has been pending in the district court since 1969.

2. a. In 1969 and 1970, the Secretary of the Interior and the LaJolla, Rincon and San Pasqual Bands filed complaints with the Commission, alleging that Mutual and Vista had violated the terms of Mutual's 1924 license. They sought, *inter alia*, increased annual charges[5] to the Bands through the term of the 1924 license. In response, the Commission initiated

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[4] Mutual's license expired in 1974. Since then, it has operated Project No. 176 under annual licenses issued pursuant to Section 15(a) of the FPA, 16 U.S.C. 808(a).

[5] Annual charges are the sums paid by a licensee for use of reservation lands pursuant to the provisions of Section 10(e) of the FPA, 16 U.S.C. 803(e).

an investigation pursuant to Section 4(g) of the FPA, 16 U.S.C. 797(g).

In April 1971, Mutual (subsequently joined by the City of Escondido) filed an application with the Commission for a new minor hydroelectric license[6] for Project No. 176. In its application, Mutual proposed to continue operating the project as it had during the original license period.

In 1972, the Secretary requested the Commission to recommend federal takeover of Project No. 176, pursuant to Section 14 of the FPA, 16 U.S.C. 807, after expiration of the original license.[7] Additionally, the LaJolla, Rincon, and San Pasqual Bands, acting pursuant to Section 15(b) of the FPA, 16 U.S.C. 808(b), applied for a nonpower license, under the supervision of Interior, to take effect when the original license expired.[8] The Pauma and Pala Bands subsequently joined in this application. Under both Interior's federal takeover proposal and the Bands' application for a nonpower license, the licensed project facilities would be used for the economic development, primarily agricultural and recreational, of the reservations.

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[6] Section 10(i) of the FPA, 16 U.S.C. 803(i), authorizes the Commission to waive certain conditions and requirements in issuing a minor license for a complete project with a capacity not exceeding 2,000 horsepower (which is the equivalent of 1,500 kw).

[7] Section 14(b) of the FPA, 16 U.S.C. 807(b), authorizes the Commission to recommend to Congress that the federal government take over a project following expiration of the project's license. If Congress enacts legislation to that effect, the project is operated by the government.

[8] Section 15(b) of the FPA authorizes the Commission to grant a license to use a project as a "nonpower" facility if it finds the project no longer is adapted to power production.

b. After extensive hearings, an administrative law judge ("ALJ") concluded that Project No. 176 is not subject to the Commission's licensing jurisdiction because the power aspects of the project are insignificant in comparison to the project's primary purpose of conveying water for domestic and irrigation consumption (see Pet. App. 74-75). The ALJ emphasized that the horsepower generated by the entire project was "not even the equivalent to that produced by a half dozen modern automobiles" (Pet. App. 13). The ALJ accordingly recommended dismissal of all Commission proceedings relating to Project No. 176.

c. The Commission reversed the ALJ, holding that it had jurisdiction over the project. In so holding, the Commission concluded (Pet. App. 77-78; footnotes omitted):

> So long as any part of a project is situated on navigable waters, or on public lands or reservations, and so long as that project generates any electric power, however minor in amount and however insignificant to the project as a whole, and so long as interstate or foreign commerce is affected, the works of that project are subject to be licensed and required to be licensed under the Federal Power Act.

With regard to the past operation of Project No. 176, the Commission found that Mutual had violated its license by permitting Vista's joint use of project facilities and by diverting water stored in the Lake Henshaw reservoir and pumped from that reservoir through the Escondido Canal (Pet. App. 226-232). It awarded readjusted annual charges to the LaJolla and Rincon Bands as of September 1969, and to the San Pasqual Band as of May 1970, in amounts based on the operations authorized by the 1924 license (*id.* at 232-234). The Commission held, however, that any

retroactive compensation for use of reservation lands (other than as authorized by Mutual's 1924 license) must be sought in federal district court (*id.* at 230).

The Commission denied Interior's recommendation for federal takeover of Project No. 176 and the Bands' application for a nonpower license. Instead, it granted a new 30-year license to petitioners Mutual, the City, and Vista.[9] The Commission included certain conditions in the new license designed to satisfy the requirements of Sections 4(e) and 10(a) of the FPA, 16 U.S.C. 797(e) and 803(a), that the license "not interfere or be inconsistent" with the purposes for which the Indian reservations were created and that the project be the one "best adapted to a comprehensive plan" for the development of the San Luis Rey River (Pet. App. 147, 185). Specifically, the Commission required development of a permanent water operating plan (*id.* at 171) and delivery of certain quantities of water to the LaJolla, Rincon, and San Pasqual Reservations for domestic, agricultural, and commercial uses (*id.* at 187). The Commission did not impose similar conditions with respect to the Pala, Pauma and Yuima Reservations, which are located downstream from the project, because it concluded that Section 4(e) applies only to reservations that are physically occupied by the project facilities (Pet. App. 138).

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[9] Although Vista had not applied for a license with Mutual, the Commission determined that it should be made a joint licensee because its Henshaw facilities are an integral part of the project (Pet. App. 80-86). Once the Commission decided to include the Henshaw facilities in the project license, it treated the proceedings as an application for an initial license rather than as a relicensing pursuant to Section 15 of the FPA, 16 U.S.C. 808 (Pet. App. 133-137 & n.136).

Pursuant to Section 4(e) of the Act, the Secretary of the Interior developed conditions for inclusion in the license which he deemed "necessary for the adequate protection and utilization" of the affected reservations. The Commission accepted some of the Secretary's Section 4(e) conditions, but rejected or modified others on the ground that they would prevent the Commission from carrying out its licensing obligations (Pet. App. 143-155).[10]

Finally, the Commission noted that the outcome of the water rights litigation pending in district court may have a significant impact on the continued validity of the license (Pet. App. 187 n.192).[11] It therefore specified that the license may be modified "in any manner considered appropriate" after disposition of the water rights litigation (*id.* at 259).

3. a. The court of appeals reversed the Commission's order issuing a license to petitioners and remanded the case to the Commission for further proceedings (Pet. App. 1-29). The court first upheld the Commission's assertion of jurisdiction over the project. Although it recognized that the principal function of the project was to convey water (*id.* at 13-14), the court held that the Commission had reasonably construed the Federal Power Act as granting it jurisdiction over all projects "for the development, transmission, and utilization of power" (16 U.S.C.

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[10] The Commission rejected the Secretary's Section 4(e) conditions with respect to the Pala, Pauma and Yuima Reservations because the project is not located within those reservations (Pet. App. 146-147).

[11] Section 9(b) of the FPA, 16 U.S.C. 802(b), requires applicants for water power licenses to submit satisfactory evidence to the Commission that they possess the necessary water rights to operate the project as authorized in a license.

797(e)), even where the generation of power is not a significant aspect of the project's purpose (Pet. App. 15). In addition, the court upheld the Commission's determination that all of the licensed facilities are physical structures that are "used and useful" in connection with the power elements of the project (16 U.S.C. 796(11)) and thus within the scope of the Commission's jurisdiction (Pet. App. 16).

The court held, however, that under Section 8 of MIRA (26 Stat. 714),[12] petitioners are required to obtain from the LaJolla, Rincon and San Pasqual Indians right-of-way permits that are subject to the approval of the Secretary of the Interior, before they may utilize the project facilities that occupy those reservations. The court concluded that a private party must follow the procedures set forth in Section 8 of MIRA in order to obtain a right-of-way for a Commission-licensed water project across Mission Indian reservation lands. In so doing, the court rejected the Commission's argument that Section 29 of the FPA, 16 U.S.C. 823, which repealed all acts or parts of acts inconsistent with the FPA, pro tanto repealed Section 8 of MIRA. Relying on *Lac Courte Oreilles Band of Lake Superior Chippewa Indians* v.

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[12] Section 8 of MIRA provides in pertinent part:

> Subsequent to the issuance of any tribal patent, or of any individual trust patent * * * any citizen of the United States, firm, or corporation may contract with the tribe, band, or individual for whose use and benefit any lands are held in trust by the United States, for the right to construct a flume, ditch, canal, pipe, or other appliances for the conveyance of water over, across, or through such lands, which contract shall not be valid unless approved by the Secretary of the Interior under such conditions as he may see fit to impose.

FPC, 510 F.2d 198, 210-212 (D.C. Cir. 1975), the court concluded that the interference/inconsistency proviso of FPA Section 4(e)[13] "would be meaningless if Congress meant to extinguish preexisting Indian rights whenever they came into conflict with the Commission['s] comprehensive jurisdiction over power projects on federal lands" (Pet. App. 21). The court further concluded that Section 8 of MIRA and the FPA do not conflict, explaining that "[w]here a project requiring a license * * * crosses lands to which MIRA applies, the operator of that project is required both to obtain a license from the Commission, and to obtain the necessary right-of-way by the method provided in section 8 of MIRA" (Pet. App. 21).

In addition, the court of appeals held that the Commission lacked authority to reject or modify any of the license conditions propounded by the Secretary of the Interior pursuant to Section 4(e) of the FPA (Pet. App. 22-25).[14] The court rejected the argument that its interpretation of Section 4(e) conflicts with the Commission's obligation under Section 10(a) of the FPA, 16 U.S.C. 803(a), to approve a project that will be the "best adapted to a comprehensive plan" for the utilization of waterways and the development of

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[13] That proviso states that the Commission must find that the "license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired * * *."

[14] Section 4(e) provides in pertinent part:

> licenses * * * issued within any reservation * * * shall be subject to and contain such conditions as the Secretary of the department under whose supervision such reservation falls shall deem necessary for the adequate protection and utilization of such reservations * * *.

power. The court concluded that Sections 4(e) and 10(a) are not inconsistent, reasoning (Pet. App. 24):

> In the case of a project within a reservation, once the Secretary of the Interior has propounded those conditions deemed necessary for the protection and utilization of the reservation, the Commission is free to modify the proposal in other ways, but not by altering or omitting Interior's conditions, to make it feasible and beneficial to the public. If this cannot be done, the Commission may decline to issue a license at all.

The court also rejected the claim that its construction of Section 4(e) would give the Secretary of the Interior an "unconditional veto power" over licensing authority, noting that any license issued by the Commission that includes conditions propounded by the Secretary would be subject to judicial review pursuant to Section 313(b) of the FPA, 16 U.S.C. 825*l*(b) (Pet. App. 24-25, as amended at Pet. App. 32-33).

Finally, the court held that for purposes of Section 4(e), the license is not only "within" the three reservations (LaJolla, Rincon and San Pasqual) that the project traverses, but it is also "within" the other three reservations (Pala, Pauma and Yuima) that may be affected by the project because of their geographical location downstream from the project in the San Luis Rey River watershed. The court noted that the definition of "reservation" in the FPA includes "interests in lands" owned by the United States and reserved from private appropriation under public land laws (16 U.S.C. 796(2)), and it concluded that the water rights of the Pala, Pauma and Yuima Bands come within this definition (Pet. App. 25-26). Although it acknowledged that the use of the phrase

"licenses * * * *within* any reservation" suggests that a project must be physically situated on a reservation before the provisions of Section 4(e) come into play, the court stated that it would resolve any ambiguity in the statute in favor of the Indians. The court reasoned (Pet. App. 27-28):

> A water project may occupy a geographical portion of an Indian reservation without impinging in any serious way on Indian interests—e.g., by crossing a corner of the reservation with a power line or an access lane. Conversely, a project may turn a potential useful reservation into a barren waste without ever crossing it in the geographical sense—e.g., by diverting the waters which would otherwise flow through or percolate under it. We will not attribute to Congress, on account of the mere presence in its enactment of one ambiguous word, the perverse and illogical intention of guarding carefully against the former danger while openly embracing the latter.

b. On petitions for rehearing, Judge Anderson dissented from portions of the panel's original opinion (Pet. App. 33-41). Noting that the FPA itself contains a pervasive scheme for obtaining rights-of-way over tribal lands and that the legislative history of the FPA shows that Congress rejected an amendment that would have required tribal consent before a license could be issued for projects affecting certain tribal lands, Judge Anderson concluded that Section 8 of MIRA cannot be considered as establishing a prerequisite for obtaining rights-of-way for FPA-licensed projects over Mission Indian reservation lands (Pet. App. 34-37). Furthermore, Judge Anderson concluded that, although the Secretary of the Interior's Section 4(e) conditions must be included in a

license to the extent they are reasonable, the responsibility for making the initial reasonableness determination should rest with the Commission, rather than the Secretary or the reviewing court (Pet. App. 40-41).

ARGUMENT

This case presents several questions of potential importance concerning the proper roles of the Federal Energy Regulatory Commission, the Secretary of the Interior and affected tribes in the context of an application for a license to operate a hydroelectric project on Mission Indian reservation lands. As already noted, when the case was in the court of appeals the Secretary and the Commission expressed opposing views with respect to these questions. The Secretary and the Commission adhere to their previously expressed positions on the merits of the questions presented in the petition. For our part, however, we believe it unnecessary to resolve those differences here because, in any event, the case does not warrant review by this Court.

We are guided by the following considerations. The questions presented involve the construction of statutory provisions that had not previously been construed differently by any other court in this context. There is, therefore, no present conflict with the decisions of this Court or of the other courts of appeals that requires resolution. Moreover, although the court of appeals upheld the Commission's assertion of jurisdiction over the project involved here, it nevertheless is relevant, in our view, that the project is essentially a water conveyance facility with insignificant power production capacity. Accordingly, we believe that this case is not a suitable vehicle for deciding the issues concerning the scope of the Federal

Power Act. Furthermore, although petitioners argue that the court's decision will have a "profound[] impact [on] many major projects due for relicensing" (Pet. 7; footnote omitted), the Commission treated this case as an initial licensing proceeding, rather than a relicensing proceeding. Thus, it is doubtful whether future problems of significant proportions are likely to arise from application of the decision below in the context of relicensing proceedings. If such problems do in fact arise in cases involving major power projects, there will be time enough to deal with them.

1. Contrary to petitioners' assertions (Pet. 11-13, 16-17), the court of appeals' decision does not conflict with any decisions of this Court. The court's holdings that the FPA's Section 4(e) interference/inconsistency proviso incorporates MIRA's Section 8 right-of-way requirements, that the Secretary of the Interior's Section 4(e) conditions may not be modified or rejected by the Commission, and that those conditions may extend to reservations that are not physically occupied by the project but whose water rights may be affected by the project, all turn on statutory construction issues of first impression in this Court.

None of the cases cited by petitioners specifically addressed the issues presented here. The question in *First Iowa Hydro-Electric Cooperative* v. *FPC*, 328 U.S. 152 (1946), was whether Section 9(b) of the FPA, 16 U.S.C. 802(b), required an applicant to obtain a state permit for dam construction before it could seek a license from the Commission. The Court held that Section 9(b) did not incorporate the state permit requirements into the federal licensing scheme. Similarly, in *FPC* v. *Oregon*, 349 U.S. 435, 441-446

(1955), the Court concluded that the Commission had exclusive jurisdiction under the FPA to license a power project on reserved lands of the United States, and that the FPA did not require the applicant to secure the state's additional permission to construct and operate such a project. Neither of these cases involved any question concerning the proper interpretation of Section 4(e) of the FPA with regard to projects on Indian reservation lands.[15]

Although the decision in *FPC* v. *Tuscarora Indian Nation*, 362 U.S. 99 (1960), which concerned the Commission's authority to license a project on Indian lands, contains broad language describing the Commission's authority under the FPA,[16] that decision

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[15] Although part of the project involved in *FPC* v. *Oregon* was to be located on an Indian reservation, the Court observed (349 U.S. at 444) that the Indians had consented to the project. We note that *FPC* v. *Idaho Power Co.*, 344 U.S. 17 (1952), on which petitioners also rely (Pet. 17), similarly does not involve an interpretation of FPA Section 4(e).

[16] The Court in *Tuscarora* stated (362 U.S. at 118):

> The Federal Power Act constitutes a complete and comprehensive plan for the development and improvement of navigation and for the development, transmission and utilization of electric power in any of the streams or other bodies of water over which Congress has jurisdiction under its commerce powers, and upon the public lands and reservations of the United States under its property powers. See § 4(e). It neither overlooks nor excludes Indians or lands owned or occupied by them. Instead, as has been shown, the Act specifically defines and treats with lands occupied by Indians—"tribal lands embraced within Indian reservations." See §§ 3(2) and 10(e). The Act gives every indication that, within its comprehensive plan, Congress intended to include lands owned or occupied by any person or persons, including Indians.

also did not address the particular issues raised by petitioners. In *Tuscarora*, this Court concluded that certain lands that were owned in fee by the Indians and were proposed as a site for a hydroelectric project, were not within a "reservation" as that term is defined by the FPA because the United States owned no interest in them. 362 U.S. at 110-115. The Court therefore held that the Commission was not required to make a Section 4(e) interference/inconsistency determination because that proviso does not apply to non-reservation lands.

In short, the decision below involves statutory construction issues of first impression that have not yet been addressed by this Court. Unless the decision is likely to create significant problems in future cases, review by this Court would appear to be unwarranted.

2. Contrary to petitioners' claim (Pet. 11), there is no firm basis for concluding that the court of appeals' decision is likely to result in recurring problems of significant proportions in future relicensing cases. It is true that, of the 870 hydroelectric projects already licensed by the Commission, approximately 17 are located on Indian reservation lands.[17] It is also true that Section 6 of the FPA, 16 U.S.C. 799, authorizes the Commission to issue licenses for up to 50 years and that, because the FPA was enacted in 1920, many projects that the Commission licensed on federal reservations are due for relicensing.

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[17] These 17 projects include major power facilities at Flatland Lake, Montana, with a capacity of 168 megawatts ("mw"), and at Pelton Oregon, with a capacity of 355 mw. (These figures were gleaned by a recent computer search of Commission records of hydroelectric licenses on file with the Commission.)

It is not at all certain, however, that the court of appeals' decision would apply to these projects. The Commission in the instant case elected to treat this proceeding as an initial licensing proceeding under Section 4(e) of the FPA, 16 U.S.C. 797(e), rather than as a relicensing proceeding under Section 15(a) of the Federal Power Act, 16 U.S.C. 808(a). It did so because it found that the project that Mutual sought to relicense was materially different from the project as originally licensed (Pet. App. 133, 136-137). If it is ultimately held that Section 4(e) does not apply in an ordinary relicensing proceeding,[18] then the court of appeals' decision is unlikely to have any impact in the relicensing context.[19]

In any event, the court's ruling concerning the applicability of Section 8 of MIRA to the Commission's interference/inconsistency determination under FPA Section 4(e) is of direct significance only with respect to hydroelectric projects that require a right-of-way across Mission Indian reservation lands. Apart from

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[18] The Secretary of the Interior and the Bands maintained in the administrative proceeding that Section 4(e) applies in a relicensing proceeding because Section 15(a) specifically incorporates the "terms" of "existing laws." In its decision below, the Commission found it unnecessary to address the question because it treated this action as an original licensing, rather than a relicensing, proceeding (Pet. App. 133-137 & n.136).

[19] Although petitioners contend (Pet. 17 n.24) that the Commission erred in treating this case as an original licensing proceeding, rather than a relicensing proceeding, petitioners did not preserve this objection in their application for rehearing before the Commission and thus it is not properly before this Court. 16 U.S.C. 825*l*(b). At all events, any uncertainty concerning the status of the proceeding constitutes an additional factor militating against review here.

Project No. 176 at issue here, we are aware of no other such project.[20]

In addition, even though the ruling that the Commission lacks authority to modify or reject the Secretary's Section 4(e) conditions has potentially broad applicability, we note that, historically, when the Commission has raised objections to particular conditions developed by the Secretary for the protection and utilization of reservations under his control, the Commission and the Secretary have been able to reach a mutually agreeable resolution. There is no reason to suppose that the inability of the Secretary and the Commission to resolve their differences in this case portends numerous irreconcilable differences in future cases.[21]

3. Finally, we believe that the peculiar facts of this case make it an inappropriate vehicle to test the scope of the Federal Power Act. As the Commission noted in its decision, this project is essentially a water conveyance facility (Pet. App. 132, 338). Power production is an insignificant aspect of the project; indeed, the ALJ described the amount of power produced by this project as not even equivalent to that produced by six modern automobiles (see *id.* at 13). In our view, the potentially important questions of

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[20] We note that it is not at all clear whether treaties or statutes governing other Indian tribes that contain provisions similar to Section 8 of MIRA would necessarily be deemed incorporated into FPA Section 4(e) under the authority of the court's ruling in this case (see Pet. 14 n.21).

[21] There is only one reported decision prior to this case involving a licensing proceeding in which the Commission was unable to resolve its differences with a Secretary with supervisory responsibility for a federal reservation. *Pacific Gas & Electric Co.*, 53 F.P.C. 523 (1975) (Secretary of Agriculture).

statutory construction presented here should not be resolved in a case involving a water conveyance project with inconsequential power capabilities.

Moreover, underlying the instant case is a dispute over water rights that is currently being litigated in the district court. Because, as the Commission acknowledged (Pet. App. 99), it has no jurisdiction to adjudicate water rights, those issues are not present here. Even so, the Commission has recognized that the outcome of the water rights litigation might necessitate changes in the instant license, and it made the entire licensing proceeding subject to reconsideration at the conclusion of that litigation (*id.* at 259). In a sense, then, it would be premature to review the instant licensing case before resolution of the water rights case.[22]

For the foregoing reasons, we submit that the Court should adopt a "wait and see" approach. If the court of appeals' decision is found to produce significant problems in future cases by preventing the relicensing of major power projects, or if another circuit adopts a contrary view of the statute, review of the issues presented might well be warranted. Until then, however, there is no compelling need for this Court to address these issues.

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[22] We also note that the controversy over whether this case involves an initial licensing proceeding or a relicensing proceeding (see note 19, *supra*), makes this an unattractive case in which to review the questions presented.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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